

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

REV. EARNEST LEE HOBLEY,

Plaintiff,

v.

KENTUCKY FRIED CHICKEN, INC.,

Defendant.

**Civil Action No. 04-0314 (RMC)
04-0492**

MEMORANDUM OPINION ON MOTION FOR RECONSIDERATION

Rev. Earnest Lee Hobley brought two lawsuits, *pro se*, against KFR U.S. Properties, Inc. (sued as Kentucky Fried Chicken, Inc.) (“KFC”) alleging fraud, wage-and-hour violations relating to his final paycheck, and the common law tort of “false accusation.”¹ KFC removed the cases from Superior Court and moved to dismiss the case. On August 3, 2004, the Court granted in part, and denied in part, KFC’s motion to dismiss based upon the arbitration agreement signed by Rev. Hobley as a condition of his employment. *Hobley v. Kentucky Fried Chicken, Inc.*, Nos. 04-0314, 04-0492, Memorandum Opinion (D.D.C. August 3, 2004) (“*Hobley I*”). KFC moves for reconsideration of that part of the Court’s opinion denying its motion to dismiss.

The issue on reconsideration is whether a claim of false accusation for reporting an alleged theft by an employee is subject to arbitration under an agreement that applies to “any claims

¹ Rev. Hobley filed his first complaint on January 21, 2004 complaining of fraud and a violation of KFC’s final paycheck policy. This complaint also alleged termination due to “religious bias toward me being an Ordained Baptist preacher” based on 42 U.S.C. § 2000e. When this complaint was removed to federal court, Rev. Hobley moved to remand to Superior Court and argued that he was not asserting a claim under Title VII.

Rev. Hobley filed a second complaint on February 24, 2004, alleging the common law tort of false accusation.

that arise between” the parties, where the theft is reported after the employment relationship has been severed. The Court finds that the claim is subject to arbitration because it is a claim between the parties that arises out of their employment relationship. As no justiciable claims remain, Rev. Hobley’s complaint will be dismissed.

BACKGROUND FACTS AND PRIOR PROCEEDINGS²

On May 27, 2001, Rev. Hobley applied for employment with KFC. At that time, he signed an application form that included a provision entitled “ARBITRATION OF EMPLOYEE RIGHTS.” This arbitration clause stated:

Because of the delay and expense of the court systems, KFC and I agree to use confidential binding arbitration for any claims that arise between me and KFC, its related companies, and/or their current or former employees. Such claims would include any concerning compensation, employment (including, but not limited to, any claims concerning sexual harassment), or termination of employment. Before arbitration, I agree: (i) first, to present any such claims in full written detail to KFC; (ii) next, to complete any KFC internal review process; and (iii) finally, to complete any external administrative remedy (such as with the Equal Employment Opportunity Commission). In any arbitration, the then prevailing rules of the American Arbitration Association (and to the extent not inconsistent, the then prevailing rules of the Federal Arbitration Act) will apply.

See Motion to Enforce Arbitration Agreement and to Dismiss, Exh. A. Rev. Hobley initialed a second, nearly identical, provision when he was eventually hired as an Assistant Manager on June 6, 2001. *See id.* Exh. B.³

² The facts are laid out in *Hobley I* and will be summarized here only as relevant to the remaining issue.

³ This provision stated:

Because of, among other things, the delay and expense which result from the use of the court systems, KFC and I agree to use confidential binding arbitration for any claim that arise between

On July 31, 2001, Rev. Hobley began training for the position of Assistant Manager. One part of Rev. Hobley's training included instruction on KFC's Cash and Security Guidelines ("Guidelines"), for which he signed an "ACKNOWLEDGEMENT" [sic] that he had read and understood them. *See* KFC's Statement of Points and Authorities In Support of Its Motion for Reconsideration ("Motion"), Exh. 1.⁴ The Guidelines detailed the required procedure for daily transport and bank deposit of cash receipts, and warned that any theft of funds will be criminally prosecuted. *Id.* ("It is the intent of the Company to criminally prosecute all cases where theft is involved.").

Rev. Hobley was the Assistant Manager for the morning shift on February 7, 2003. Under the Guidelines, it was his responsibility to take the prior day's receipts out of the store's safe and deposit them at the bank. On February 8, 2003, Rev. Hobley resigned his employment after

me and KFC, its parent and affiliated corporations and/or any of their current or former officers, directors, agents, and employees. Such claims would include any claims concerning compensation, employment (including, but not limited to, any claims concerning sexual harassment), or termination of employment. I also agree, before using this arbitration process (i) first, to present any such claims in full written detail to the KFC Human Resources Department; (ii) next, to pursue to completion any KFC internal review process; and (iii) finally, to pursue to completion external administrative remedy (such as with the Equal Opportunity Commission). In any arbitration, the then prevailing rules of the American Arbitration Association (and, to the extent not inconsistent, the then prevailing rules of the Federal Arbitration Act) shall apply.

Motion to Enforce Arbitration Agreement and to Dismiss, Exh. B.

⁴ The Acknowledgment included the statement, "I also understand that I will be subject to these guidelines in cases of cash losses or violations of guidelines . . . and that a breach of the KFC RESTAURANT CASH AND SECURITY GUIDELINES may result in corrective action up to and including termination of employment." *Id.* (capitalized in original).

learning that he would be demoted for performance reasons. Thereafter, KFC discovered that no deposit had been made on the morning of February 7, 2003. On February 28, 2003, the General Manager of the restaurant reported to the D.C. Metropolitan Police Department (“MPD”) that Rev. Hobley had stolen \$1,589.12 from KFC – the day’s receipts for February 7. An arrest warrant was issued, and Rev. Hobley was arrested at his home on June 13, 2003. By judgment entered on February 6, 2004, the Superior Court of the District of Columbia found Rev. Hobley not guilty.

In its initial decision on KFC’s motion to enforce the arbitration agreement and dismiss, this Court found the wage-and-hour claim arbitrable, but denied KFC’s motion to dismiss Rev. Hobley’s false-accusation claim because the event on which it is based – the February 28, 2003, report to the police – happened after his employment with KFC had been severed. While Rev. Hobley twice agreed to arbitrate “any claims that arise between [himself] and KFC,” *Hobley I* reasoned that the agreement applied only to claims that arose during Rev. Hobley’s employment. For this reason, his wage claim was referred to arbitration and his false-accusation claim was not. KFC subsequently moved for reconsideration of that part of the Court’s August 3, 2004 Order denying its motion to enforce the arbitration of Rev. Hobley’s claim of false accusation.

ANALYSIS

There is a strong policy favoring alternative means of dispute resolution, *Masurovsky v. Green*, 687 A.2d 198, 201 (D.C. 1997), and any doubts concerning the scope of arbitrability will be resolved in favor of arbitration. *Moses v. H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Where an arbitration provision is “susceptible of an interpretation” that arbitration is required, a court must order arbitration. *Haynes v. Kuder*, 591 A.2d 1286, 1289 (D.C. 1991).

Whether any particular claim is subject to arbitration is a matter of the parties' agreement. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995). *See Bailey v. Fed. Nat. Morg. Ass'n*, 209 F.3d 740, 746 (D.C. Cir. 2000) (courts look to the contract to determine whether the parties have consented to arbitrate). The party resisting arbitration must prove that the claims at issue are unsuitable for arbitration. *Nelson v. Insignia/Esg., Inc.*, 215 F. Supp. 2d 143, 150 (D.D.C. 2002).

The KFC arbitration clause requires that the parties “use confidential binding arbitration for any claim[s] that arise between [Hobley] and KFC . . . includ[ing] any claims concerning compensation, employment (including, but not limited to, any claims concerning sexual harassment), or termination of employment.” *See* Motion to Enforce Arbitration Agreement and to Dismiss, Exh. A. KFC reported Rev. Hobley to the MPD for allegedly stealing cash while he was an employee. The Guidelines, which were a term and condition of Rev. Hobley's job and which he agreed to follow, create explicit duties for managing cash receipts. The Guidelines also provide the remedy for theft: “It is the intent of the Company to criminally prosecute all cases where theft is involved.” Motion Exh. 1. A claim relating to a breach of these duties is one “concerning . . . employment” and falls squarely within the scope of the arbitration agreement.⁵

Rev. Hobley relies upon a distinction made by this Court in *Hobley I* that his false-accusation claim is not a claim “concerning . . . employment” because the report to the MPD

⁵ In *Hobley I*, this Court did not consider the Guidelines. Without the Guidelines, the Court found that Rev. Hobley's claim of false accusation was “not based on an event that had its genesis in something he did while a KFC employee.” *Hobley I* at 6. Subsequent briefing included a copy of the Guidelines and clarified that Rev. Hobley initialed a second “acknowledgment” of the Guidelines when he was hired as Assistant Manager. Accordingly, this Court has considered the Guidelines in reaching its decision on the motion for reconsideration.

occurred after his employment ceased. Response to KFC’s Motion for Reconsideration at 2.⁶ While the timing of a tort is probative on the question of arbitrability, this Court is persuaded that it is not necessarily dispositive.

Torts committed after employment ends may be arbitrable if the claims “aris[e] out of the employment or termination of employment” of a plaintiff. *Fleck v. E.F. Hutton Group, Inc.*, 891 F.2d 1047, 1051-52 (2d Cir. 1989) (alleged post-employment defamation concerned truth or falsity of events during employment and was arbitrable). *See also Aspero v. Shearson Am. Express, Inc.*, 768 F.2d 106, 109 (6th Cir. 1985) (post-termination claim of defamation arbitrable because resolution depended on evaluation of work performance during employment); *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163 (8th Cir. 1984) (post-employment reports to brokerage agencies subject to arbitration since claims relied on handling of customer accounts during employment). Indeed, the determinative issue is not whether the tort occurred after the employment relationship had ceased. Rather, the “proper question is whether resolution of the claim depends upon evaluation of a party’s performance . . . during the time of the contractual relationship.” *Aspero*, 768 F.2d at 109.

Rev. Hobley’s claim of false accusation sounds in defamation or malicious prosecution. Defamation requires evidence that: 1) the defendant made a false and defamatory statement concerning the plaintiff; 2) that the defendant published the statement without privilege to a third party; 3) that the defendant’s fault in publishing the statement amounted to at least

⁶ Although *Hobley I* distinguished the criminal report as a singular, post-employment event not subject to arbitration, its reasoning on arbitrability did not consider the Guidelines. *See Hobley I* at 6. As the Court now finds that disputes arising from the Guidelines are arbitrable, the fact that the criminal report occurred post-employment is less relevant.

negligence; and 4) either the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm. *Carter v. Hahn*, 821 A.2d 890, 893 (D.C. 2003) (claim of defamation brought for false accusation that lead to criminal arrest). A claim of malicious prosecution requires evidence that: 1) the original action was instituted maliciously; 2) without probable cause; and 3) was terminated in the plaintiff's favor. *Ammerman v. Newman*, 384 A.2d 637,639 (D.C. 1978).

In a defamation action, any determination that KFC negligently made a defamatory statement depends upon numerous facts that arise out of Rev. Hobley's employment relationship with KFC, including his duties under the Guidelines and his performance as Assistant Manager.⁷ Further, proof of probable cause and malicious intent in a claim of malicious prosecution requires consideration of these same factual predicates. Accordingly, Rev. Hobley's false-accusation claim must be considered one that "arise[s] out of or relate[s] to" his former employment. *Nur v. KFC*, 142 F. Supp. 2d 48 (D.D.C. 2001). That the final act constituting the alleged tort – a criminal report to the MPD – was published after he severed his employment relationship is a distinction of little importance.

⁷ In addition, whether a qualified privilege exists because "a statement about suspected wrongdoing is made in good faith to law enforcement authorities" involves similar consideration of employment-based facts. *Columbia First Bank v. Ferguson*, 665 A.2d 650, 655 (D.C. 1995) (citations omitted).

The Court grants the motion for reconsideration and rules that Rev. Hobley's false-accusation claim comes within the parties' agreement to arbitrate disputes. The case will be dismissed.

A separate order accompanies this memorandum opinion.

DATE: October 26, 2004.

/s/_____
ROSEMARY M. COLLYER
United States District Judge